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DISTRICT JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an action under the Lord Campbell's Act to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence and wantonness of the defendant in the operation of his automobile.

In compliance with Rule 52(a), Rules of Civil Procedure, I find the facts specially and state my conclusions of law thereon, in the above cause, as follows:

FINDINGS OF FACT

1. Plaintiff is a citizen of the State of North Carolina, and the defendant is a citizen of South Carolina, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. At about 1:20 a. m. on May 13, 1956, the Sheriff of Sumter County, South Carolina, received a telephone call and in response to the call went about fourteen miles east of Sumter on U. S. Highway 378 and there found plaintiff's intestate L. T. McGee lying on his face, dead, off of the roadway on the left side (going east); there were glass and debris in the center of the highway and glass was strewn up and down the road; there were skid marks in the right-hand portion of the highway (going east), beginning in the right-hand lane, and going across the center line and on off of the highway. The glass picked up at the scene was found to have the following on it: MO MO CO E IN MADE USA 12 VOLT, indicating that the broken headlight had a 12 volt ignition system and was made by Ford Motor Company. 1956 was the first year that Ford Motor Company came out with a 12 volt ignition system and only on Lincolns that year.

3. On the early morning of May 13, 1956, about two miles out of Sumter, a 1956 Lincoln convertible, pink body, black top, top up, back glass down, was parked off of the highway on the right and pulled directly in front of an insurance salesman who lived in Turbeville, South Carolina, and who was traveling toward Turbeville (east) on U. S. Highway 378; the insurance salesman had to apply brakes, to keep from hitting the Lincoln; the insurance salesman

followed along behind the Lincoln for a couple of hundred yards before passing it; after passing it he continued toward Tarboville at a speed of about 65 or 70 miles per hour. The Lincoln had a South Carolina license. The Lincoln was occupied by a white man with a fresh haircut and black hair who was driving, and a blonde-hair woman with a pony-tail hair style.

There was another automobile behind the insurance salesman during the time he was following the Lincoln and after he passed the Lincoln, the Lincoln and the other car traveled together along the highway at approximately the same speed, with the Lincoln in front, staying about a mile behind the insurance salesman. The two cars were traveling at a speed of approximately 60 or 70 miles per hour.

About 13 or 14 miles after passing the Lincoln, the insurance salesman saw a man walking in the direction of Sumter (west) on the right-hand "set-back" about 15 or 20 feet off of the pavement, who was later identified as plaintiff's intestate L. T. McGee, and about two or three hundred yards further down the road he noticed a Ford automobile that had backed off of the paved portion of the highway, the front wheels were in the "set-back" and the back wheels were up on the "wooded part" and almost straight to the road; the headlights were not burning on the car, but the dome light inside the car was burning, the left front door was open; the car looked familiar to the insurance salesman and after traveling another hundred yards or so he decided to turn around and go back to see if he could help the man he had seen walking along the highway.

When the insurance salesman turned around and was proceeding in a westerly direction the headlights of the oncoming vehicles were facing him. When he got within five or six hundred yards of the oncoming cars, he saw the car meeting him zig-zag, or cut back and forth across the highway for a second or two—four or five zig-zags, and then he saw a black shadow between the headlights of the car he was meeting; the car he was meeting cut toward his side of the road over the white line and then straightened up; the car came over far enough in his lane that he applied

his brakes, fearing that he was going to be hit; two cars then passed him and he saw that the first car that passed was the 1956 Lincoln that he had passed when he was traveling east on U. S. Highway 378; and that the left front headlight on it was out; as the lights on the two cars passed, the insurance salesman saw just a few feet in front of him a man lying on his side of the road and he had to apply brakes to keep from running over him. The man's feet were at the edge of the pavement, a foot or so from the shoulder, his head was toward the center line toward Sumter; his back was toward the insurance salesman, lying sideways.

The insurance salesman looked back at the two cars that had passed and they cut their lights off, speeded up and did not stop. This took place between 12:45 and 1:00 o'clock a. m. The insurance salesman observed skid marks in the highway starting off at about the center of the lane of travel going toward Turbeville (east) and ending across the white line.

4. May 13, 1956, was a clear night. The road was an open highway, straight for about six or eight miles at the place of the accident. The speed limit was 55 miles an hour.

5. At around 1:30 o'clock a. m. on May 13, 1956, a Lincoln automobile, pink body, black top convertible, with the top up, with South Carolina license tags, and a Fort Jackson sticker on it, drove into a filling station at Manning, South Carolina, on U. S. Highway 301, north, a distance of about eighteen miles from the scene of the accident; a white man about 5' 9" tall, weighing approximately 180 pounds, and a white woman were in the Lincoln; the filling station operator could not say whether or not the defendant who was sitting in the Court Room during the trial of the case was the driver of the car; the woman went to the rest room and the man got a Coca-Cola; the filling station operator observed that the left front headlight was out and "wrinkles down the side" and the right rear fender was bashed in on the Lincoln automobile, and he remarked to the driver of the Lincoln about it and the driver said that he had done it on a guy wire; the man drank his Coca-Cola and the woman came back from the rest room and they got in the car and left, going back in the same direction from

which they had come; in two to four minutes after the Lincoln left the filling station a Highway Patrolman came into the filling station inquiring about a Lincoln automobile, saying that there had been a "hit and run" accident.

6. Upon information received the Sheriff of Sumter County, South Carolina, on May 27, 1956, went to Pringle Brothers Motors, Inc. in Biloxi, Mississippi, and there found a damaged left front pink fender which had been removed from a 1956 Lincoln belonging to the defendant Edmond V. Cole of Columbia, South Carolina, bearing South Carolina license. The Lincoln automobile had been brought in to Pringle Brothers Motors in Biloxi, Mississippi, on May 16, 1956, with left front fender, left cowl panel and hood panel damaged, the biggest damage being on the fender, however it was not smashed or crumpled and the paint was not damaged on it, but there was a depression on the fender, and upon direction the fender was replaced, and the hood painted.

7. After the left front fender of the Lincoln automobile of the defendant had been replaced in Biloxi, Mississippi, the defendant returned to South Carolina. A Deputy Sheriff for Sumter County, South Carolina, investigating the case went to Nelson Motors in Columbia, South Carolina, where the Lincoln automobile had been taken for repairs of the damage to the rear right of the car which had been done in New York, and when one of the mechanics at Nelson Motors took off the left front headlight rim that holds the light in and behind that in the assembly, there were small slivers of glass, showing that the light had previously been broken and replaced.

8. For the year 1956, through May 15, 1956, there were five Lincoln convertibles registered with the South Carolina State Highway Department, and 1956 South Carolina License G 1970 was issued on April 13, 1956, to Cole Studios, Building 4299, Fort Jackson, South Carolina, for a 1956 Lincoln convertible. Defendant's Lincoln convertible was the only Lincoln convertible registered with the South Carolina Highway Department that had a Fort Jackson sticker or tag on it.

9. The defendant Edmond V. Cole admitted that he owned a 1956 Lincoln convertible, black top with a light purplish (amethyst) body, and that it had a black and white Fort Jackson sticker for commercial vehicles on it, and that on the morning of May 12, 1956, all known damage to the automobile was confined to the right, rear portion of the automobile which had been caused in a collision in New York State, while the automobile was being driven by Stanley Thielman, a friend and former employee who had gone to New York with him the week prior.

10. On Tuesday, May 29, 1956, after the Sheriff of Sumter County, had been to Biloxi, Mississippi, and gotten the damaged fender, he talked with the defendant and the defendant told him that the damage to the right rear side of his 1956 Lincoln was done in New York, a few days prior to May 12, 1956, but that he did not know how the damage was done to the fender on the front left side of his car and the only thing he knew was that he had his car parked at the Columbia Drive In and apparently someone backed into the car there and the defendant said to the Sheriff, "I know what you want me to say but I am not going to say it until I have conferred with my attorney" and he then inquired of the sheriff if his prime interest in the case was to see that the family of the deceased was taken care of. The defendant could not give the Sheriff a minute account of his activities on the night of the accident.

11. The defendant admitted that he and his friend Stanley Thielman left New York, on May 11, 1956, and arrived in Columbia, South Carolina, shortly after midnight on May 12, 1956, and that around eight or nine o'clock the morning of May 12, 1956, he took his Lincoln automobile to Nelson Motors in Columbia, where he had bought it, to get an estimate for repairs of the damage done to his automobile in New York; in order to file claim under his $100 deductible collision insurance policy, and that the repairs to the rear right of his Lincoln were made by Nelson Motors some time around May 28, 1956.

12. Defendant is in the photographic business with studios at Fort Jackson, South Carolina.

13. The defendant admitted that he did not lend his Lincoln convertible or give anybody permission to use it the night of the accident, and that between the hours of 1:00 o'clock p. m. on Saturday, May 12, 1956, and 9:00 o'clock a. m. on Sunday, May 13, 1956, his Lincoln convertible was in his possession.

14. The defendant did not recall what he did on Sunday, May 13, 1956.

15. The defendant admitted that on either Monday, May 14, 1956, or Tuesday, May 15, 1956, he and Stanley Thielman left Columbia, South Carolina, to go to Biloxi, Mississippi, which is about one and one-half days' travel time from Columbia, in his damaged 1956 Lincoln convertible, and that on May 16, 1956, Stanley Thielman took the Lincoln convertible to Pringle Brothers Motors, Inc. in Biloxi, Mississippi, where the left front fender was replaced and that Pringle Brothers Motors, Inc.'s bill was for $122.39 which he paid, but that he did not make claim with the insurance company on his $100 deductible collision insurance policy, and that he and Stanley Thielman returned to Columbia, South Carolina, around May 21 or 22, 1956.

Pringle Brothers Motors' bill was for the following repairs: "Replace, left, front fender; replace front fender mldg.; str. hood panel; fill cowl panel; painting."

16. The driver of the 1956 Lincoln convertible, immediately after the "hit and run" accident told the filling station operator at Manning, South Carolina, that the damage to his Lincoln automobile had been done on a guy wire; the defendant told the Sheriff of Sumter County, South Carolina, when the Sheriff was interviewing him after his return from Biloxi, that the damage to the left front fender of his Lincoln automobile must have been done while he had it parked at the Columbia Drive In, that someone must have backed into it; at the trial of the case the defendant said that the damage to the left front of his Lincoln was done at Fort Jackson, that he found blue paint on the fender and he assumed that a blue truck usually parked in the area where he parked his Lincoln had hit it.

17. The preponderance of the evidence in this case establishes that (1) the automobile which struck and killed plaintiff's intestate was owned by the defendant Edmond V. Cole; (2) the defendant Edmond V. Cole was the driver of the 1956 Lincoln convertible automobile which struck and killed plaintiff's intestate and left the scene without stopping; (3) the negligence and wantonness of the defendant while driving his Lincoln convertible automobile was the proximate cause of plaintiff's intestate's death; (4) plaintiff's intestate was not guilty of negligence, contributory negligence or contributory wantonness.

18. L. T. McGee died intestate, survived by an only child, a married daughter, Theo McGee Tedder, who lived with him, but was supported by her husband. The deceased was sixty-nine years old at the time of his death and was a farmer. As a result of the death of her father, Theo McGee Tedder has suffered actual damages in the sum of Twenty Five Thousand ($25,000.00) Dollars. Plaintiff is, therefore, entitled to have judgment against the defendant Edmond V. Cole in the sum of Twenty Five Thousand ($25,000.00) Dollars, actual damages.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. The defendant was guilty of actionable negligence, wilfulness and wantonness in the operation of his 1956 Lincoln convertible automobile upon the highway of South Carolina, in violation of the laws and statutes of South Carolina, and the negligence, wilfulness and wantonness of the defendant was the direct, proximate and efficient cause of the injuries and death of plaintiff's intestate L. T. McGee.

3. The failure of the defendant to stop and render assistance is evidence of conscious indifference to consequences sufficient to warrant a finding of wantonness on the part of defendant. *Harrison et v. Shuff* (C. A. 2), 305 F. (2d) 333 (1962); *Garippa v. Wisotsky*, 108 N. Y. S. (2d) 67, affirmed, 280 App. Div. 807, 113 N. Y. S. (2d) 722, affirmed 305 N. Y. 551, 111 N. E. (2d) 443.

4. Circumstantial evidence in order to be sufficient to warrant a finding of fact must lead to the conclusions with reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference and not mere speculation. Such facts and circumstances must be reckoned with in the light of ordinary experience and the conclusions deducted therefrom be such as common sense indicates, and not rest upon speculation, surmise, or conjecture.

In my opinion, the evidence in this case meets the requirements of circumstantial evidence and is sufficient to establish that the defendant owned the automobile which struck and killed plaintiff's intestate, that the defendant Edmond V. Cole was the driver of the 1956 Lincoln convertible automobile which struck and killed plaintiff's intestate and left the scene without stopping, that the negligence and wantonness of the defendant while driving his Lincoln convertible automobile was the proximate cause of plaintiff's intestate's death, and that plaintiff's intestate was not guilty of negligence, contributory negligence or contributory wantonness.

5. The beneficiary for whom this action is brought is the married daughter of plaintiff's intestate.

6. Based upon the foregoing Findings of Fact and Conclusions of Law, I am of the opinion that the plaintiff Charles L. Dean, Jr., Administrator of the Estate of L. T. McGee, deceased, should have judgment against the defendant Edmond V. Cole in the Sum of Twenty Five Thousand ($25,000.00) Dollars, actual damages.

Entry of appropriate judgment is directed accordingly, and

IT IS SO ORDERED.

Dated:
Spartanburg, South Carolina,
May 17, 1963.

/s/ C. C. WYCHE,
United States District Judge.

DECISION OF UNITED STATES COURT OF APPEALS

For the Fourth Circuit, Reversing Case

Before Sobeloff, Chief Judge, J. Spencer Bell, Circuit Judge, and Thomsen, District Judge.

Irvine F. Belser, Jr. (Roger M. Heyward and Belser, Belser & Baker on brief) for Appellant, and Henry Hammer (Henry H. Edens on brief) for Appellee.

J. SPENCER BELL, Circuit Judge:

The defendant appeals from a judgment of the district court without jury in a wrongful death action. Shortly after midnight of May 12-13, 1956, plaintiff's decedent, a 69 year old farmer, was run over and killed by a passing motorist in a rural area between Sumter and Turbeville, South Carolina. The two lane road was straight for several miles each way from the place of the accident. The night was clear. There were no intersecting roads. The testimony of the plaintiff's only eyewitness is carefully summarized as follows: The witness left Sumter for Turbeville, traveling in an easterly direction, with his headlights burning. About two miles out of Sumter a 1956 Lincoln convertible pulled sharply in front of him from the south shoulder of the highway, necessitating an application of brakes to avoid a collision. At this time another car was behind the witness' car. The witness followed the Lincoln closely for a couple of hundred yards, then passed it. After he had passed the Lincoln, he observed through his rear view mirror that the car following him stayed behind the Lincoln. The witness accelerated to between 60 and 70 miles an hour, traveling a distance of 13 or 14 miles, while he observed the headlights of these cars in his rear view mirror. He noticed that both of these cars remained in their relative positions approximately a mile to his rear. While these conditions maintained with respect to the relative positions and speeds of the three cars, the witness observed a man walking west toward Sumter on the south shoulder of the highway. Two or three hundred yards farther east he

observed on his right an automobile parked off the road almost at right angles thereto, with its left front door open and dome light burning. He then traveled a hundred yards or so farther to a driveway, where he turned around, having decided to offer help to the pedestrian. As the witness traveled back in a westerly direction, when he was 500 or 600 yards away from the place of the accident he observed the oncoming headlights of a car suddenly zigzag or weave for a second or two. Almost at the same instant he saw a shadow pass in front of the car lights. It appeared to the witness that the oncoming car cut slightly across the center line, then straightened up and continued towards him in its proper or eastbound lane.[1] As the first car passed him he noticed that its left front headlight had gone out. When the two cars had passed him, he observed the deceased lying in the westbound lane only a few feet in front of his car. He stopped, opened his door, looked back, but observed no lights on either of the cars which had passed, concluding that both cars had cut off all their lights and sped up as they left the scene. The witness was at the least from 200 to 300 yards away at the moment of impact. He could not see whether the deceased was "thrown" any distance or not. Upon this evidence, the district court found the driver of the car described by the witness guilty of wilful and wanton negligence which was the proximate cause of the death of plaintiff's intestate. The court also found upon this evidence that the deceased was not guilty of contributory negligence.

The defendant strenuously insists that there is not substantial evidence in the record to support the court's finding that the defendant was the driver of the hit and run car in spite of the considerable amount of circumstantial evidence in the case tending to show that he was the owner of the car in question. We do not reach this question, as we find that the evidence will not support the court's findings with regard to primary and contributory negligence.

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1 Skid marks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.

For convenience, we shall assume *arguendo* that the defendant was proven to be the driver of the car which struck and killed the deceased. The scene of the accident was on a straight, dry, level, open highway in good weather. The only specific act of negligence at or prior to the time of the accident with which the defendant is charged was speeding in excess of the posted limit, and that charge was based upon the testimony of the witness that he himself was driving between 60 and 70 miles per hour and that the defendant's car was keeping up with him "about a mile" to his rear. The posted speed limit was 55 mph. Even conceding the witness' remarkable powers of vision and depth perception—the facts to which he testified do not support his opinion. If traveling for 12 miles at an average of 65 mph he had gained a mile on the defendant's car when he passed the pedestrian—then traveled an additional ¾ mile[1]—turned around and recovered all but 400 or 500 yards of this distance before the following car began to zigzag as it approached the pedestrian—the mathematical probabilities do not sustain the proposition that defendant's car was traveling in excess of 55 mph. But we do not rest our opinion on mathematical computation, because too many unknown factors existed—we simply say that the evidence does not supply sufficient facts to justify the court in accepting the witness' estimate of speed on this critical issue. Even, however, if we concede this point there is still a fatal weakness in the plaintiff's proof. Unless we know at what distance the deceased entered the highway ahead of the oncoming car, we cannot find that the speed of the car was the proximate or efficient cause of his death. Section 26-7 of the Code of Laws of South Carolina (1952) provides that:

> "The provisions of chapter 7 of Title 46 declaring *prima facie* speed limitations shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of the accident."

[1] Evidence of later measurements showed it to be ¾ of a mile from the location of the body to where the witness turned around.

We may not infer that the speed of the automobile was the proximate cause of the accident unless we have some factual basis to support the inference. Similarly there is no basis for an inference of negligence in the evidence that the car "zigzagged" into the west bound lane for a second or two before, or at the instant of, the impact in the absence of any evidence as to when or at what distance the deceased entered the road in front of the oncoming car.

The plaintiff's own evidence in this case shows his deceased to have been guilty of contributory negligence as a matter of law. That evidence shows that the deceased was walking 15 or 20 feet off the road on the south shoulder of the eastbound lane of the highway. Both the testimony of the eyewitness and the physical facts indicate that the deceased was struck a few seconds later at or near the center line of the highway. The facts make it clear that the deceased got into the highway at a time when vehicles were approaching from both directions, their headlights clearly visible, and traveling at considerable speed. There was no obstruction to interfere with or obscure his vision. There was no intersecting road or driveway—simply wide open country. The law of South Carolina gave the right of way to the vehicular traffic—not the pedestrian. CODE OF LAWS OF SOUTH CAROLINA (1952), §46-435. To cross the highway under such circumstances was negligence as a matter of law. Even if the defendant were guilty of negligence, this contributory negligence of the deceased must bar plaintiff's recovery.

In *Smith v. Biggs*, 223 F. (2d) 839 (4 Cir.), *cert. denied*, 351 U. S. 912 (1955), a diversity case, arising under the laws of South Carolina, strikingly similar on the facts to this case, the court said:

> "Obviously, Lee Biggs, whether crossing the road or walking along the road, owed a duty to look. If he failed to look, he was clearly guilty of contributory negligence. If he looked he could not have failed to see the lights of Smith's approaching car. * * *. And, of course, if Lee Biggs saw the rapidly approaching car, yet walked out on the road right into the car, his conduct was even more reckless, with an utter dis-

regard for his own safety: * * * 'He either did not look to the east, or, if he looked, he did so in such a careless and negligent manner that he failed to see what was obvious. In either event he was guilty of negligence as a matter of law.'" 223 F. (2d) at 841.

The *Smith* case cites numerous decisions of this court in support of its position. This is also the law of South Carolina. *Carwe v. Shindler*, 228 S. C. 550, 91 S. E. (2d) 254 (1956), citing and approving the *Smith* decision. See also *Williams v. Ford*, 233 S. C. 304, 104 S. E. (2d) 378 (1958).

The plaintiff argues that the driver's subsequent failure to stop and render assistance was evidence of wilful and wanton negligence which would overcome deceased's contributory negligence. Where primary negligence does exist, subsequent conduct of the actor may be considered by the fact finding tribunal in determining the degree of primary negligence. Leaving the scene of an accident may strongly indicate that the responsible party was not only negligent, but exhibited a callous disregard for the safety of others. But in the present case, there being no substantial evidence of prior negligence to support the court's finding, defendant's subsequent act of departing the scene without rendering assistance cannot relate back and transform non-negligent conduct into wilful and wanton conduct as a matter of law. *Cf. Hallman v. Cushman*, 196 S. C. 402, 13 S. E. (2d) 498 (1941).

There being no substantial evidence to support the court's findings on negligence and contributory negligence, the judgment is *Reversed.*

PETITION FOR REHEARING

The petitioner prays that this Court grant a rehearing of its decision of January 7, 1964, reversing the judgment of the District Court, upon the following grounds:

1. This Court, in reaching its conclusion that there was no substantial evidence of primary negligence on the part of the driver of the automobile to warrant the fact-finding tribunal to consider the subsequent conduct of the driver in

leaving the scene without stopping and rendering assistance as evidence of wantonness, as to which contributory negligence is not a defense under South Carolina law, apparently overlooked the incongruity of its conclusion with its conclusion that the automobile was operated on its left or wrong side of the highway as crucially noted by this Court in footnote 4 of the opinion that:

> "Skid marks on the highway at the site tended to confirm this, as they commenced in the eastbound lane, then crossed over just past the center line into the westbound lane at or near the location of the body.",

under which circumstances the decision of this Court is in direct conflict with the decisions of the South Carolina Supreme Court in *Bowers v. Carolina Public Service Co.*, 148 S. C. 161, 145 S. E. 790, and *Tinsley v. Parris*, 174 S. C. 417, 178 S. E. 496, holding, as enunciated in the headnote of *Tinsley v. Parris*, at 178 S. E. 496, that:

> "Operation of motor vehicle on left side of highway in violation of statute, where injury results, raises presumption that violation proximately caused the injury."

and in view of which the action of this Court, sitting as an appellate tribunal, constitutes an invasion of the province of the fact-finding tribunal.

2. This Court, in reaching its conclusion that plaintiff did not sustain his burden of proof that the speed of the automobile was a proximate cause of the occurrence resulting in decedent's death, seemingly overlooked the significance of the evidence that deceased's body was badly crushed and mangled because of the excessive speed at which the vehicle was traveling when it struck the deceased, that the body was found lying on the vehicle's left or wrong side of the road, that tire marks from the vehicle crossed over the center line into its wrong lane to the point where deceased's body was lying, and that no explanation was offered by the driver for being on the wrong side of the road in violation of the South Carolina Code; all of which circumstances are sufficient to warrant the conclusion that the plaintiff sustained his burden of proof in accordance

with the decision of the South Carolina Supreme Court in a strikingly factually similar case, *Brock v. Carolina Scenic Stages and Carolina Cas. Co. of Burlington*, 219 S. C. 360, 65 S. E. (2d) 468, wherein the Court stated:

> "We think the circumstances heretofore set out, when considered together, are sufficient, in the absence of any explanation by the defendants, to warrant an inference that the collision was caused by the bus being driven to the left of the center of the highway. * * *"

3. This Court, in relying on the decisions of *Smith v. Biggs*, 223 F. (2d) 839 (C. A. 4) and *Williams v. Ford*, 233 S. C. 304, 104 S.E. (2d) 378, apparently overlooked that the facts in each of the cited cases were clearly distinguishable from those in the case at bar and, therefore, not controlling herein. In *Smith v. Biggs, supra*, the occurrence took place in defendant's proper lane of travel, whereas in the instant case the evidence shows that defendant was traveling on his wrong side of the highway when the deceased was struck; and in *Williams v. Ford, supra*, there was an uncontradicted, complete, and adequate explanation offered by the defendant for crossing over to his left or wrong side of the roadway, an explanation totally lacking and absent in the present case.

CONCLUSION

With all due deference to this Honorable Court and its proclivity to do substantial justice, and fully recognizing the rarity with which this Court grants petitions for rehearing, it is earnestly and respectfully submitted that a searching and reflective analysis of the entire evidence, particularly including the facts hereinabove called to the attention of the Court, will make it clear that in accordance with principles of appellate review the judgment of the District Court should be affirmed. To hold otherwise would encourage and constitute judicial sanction for wrongdoer motorists, who strike down and kill pedestrians while driving on the wrong side of the highway in violation of statute, to escape civil liability by fleeing the scene without stopping to render aid and assistance to dying victims whose lives

might otherwise be saved and offer no explanation for driving on the wrong side of the highway, notwithstanding that the identities of such motorists may be subsequently established by circumstantial evidence.

This case presents an important question which materially affects the public health, safety and welfare of the nation, particularly when we consider that more deaths are caused from traffic fatalities in the United States than from any other cause. It is, therefore, respectfully urged that in the interest of the public health, safety and welfare of the nation, this Court should reconsider its decision, which by absolving the defendant from civil liability gives judicial sanction to wrongdoer motorists to flee the scene of a fatality and callously disregard the lives and safety of others.

For the foregoing reasons set forth above and in the brief filed by appellees, it is respectfully urged that a rehearing be granted and that upon such rehearing the judgment of the District Court be affirmed.

Respectfully submitted,

HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed by the appellee, Charlie L. Dean, Jr., Administrator of the Estate of L. T. McGee, the Court is of the opinion that no cause is shown for a rehearing, and accordingly it is

ORDERED that the said petition be, and it is hereby, denied.

Filed Feb. 11, 1964

MAURICE S. DEAN
Clerk

SIMON E. SOBELOFF,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

ROSZEL C. THOMSEN,
United States District Judge.

A true copy, Teste:

MAURICE S. DEAN, Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

By MARGARET L. DAVIS,
Deputy Clerk.

February 10, 1964.